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IN THE

Supreme Court of the United States

OCTOBER TERM — 1961

No. 596

JOHNINA, INC., a Florida corporation,
Petitioner,

vs.

MAY SPACH, Trustee of the Bankrupt Estate of HYMAN Z. GORIN and DORIS G. GORIN d/b/a DON JUAN MEN'S WEAR
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE EARL C. WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The Respondent herein, MAY SPACH, Trustee in Bankruptcy, files this, her Reply Brief, in opposition to

the Petition for Writ of Certiorari filed by the Petitioner, JOHNINA, INC., a Florida corporation, to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on June 21, 1961, wherein, on the 13th day of September, 1961, a Petition for Rehearing was denied.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at **291 F. 2d 619.**

JURISDICTION

The Respondent is in accord with the assertions directed to jurisdiction as stated on Page "2" of the Brief of Petitioner, JOHNINA, INC., a Florida corporation.

QUESTIONS PRESENTED

It is not the Respondent's desire to belabor the points, or questions, presented for Review herein. The Petitioner has seen fit to allocate several pages of its Brief to the alleged questions under determination by the Circuit Court of Appeals for the Fifth Circuit and, thusly, to be heard before this Court on Petition for Writ of Certiorari.

It is the Respondent's position, as stated in her original Brief in the Court below, that the sole and only issue is as follows:

> "Where a Trustee seeks a Turn Over of a security deposit made by the Bankrupt to a Lessor is such action subject to summary proceedings by a Referee in Bankruptcy?"

STATEMENT OF THE CASE

(In this Brief symbol "T" will refer to printed Transcript of Record.)

HYMAN Z. GORIN and DORIS G. GORIN d/b/a DON JUAN MEN'S WEAR filed a Voluntary Petition in Bankruptcy on April 30, 1959. It is not material to this Reply Brief to discuss the procedural aspects of the Bankruptcy except to note the appointment of the present Trustee, the Respondent herein, on June 5, 1959. (T-1) The essence of the issues involved in this Appeal are initiated by the Petition for Turn Over Order which, due to clerical error, was not printed in the Transcript verbatim. The Petition for Turn Over Order filed August 24, 1959, by the Trustee, alleged her capacity and sets forth the fact that JOHNINA, INC. held in its possession the sum of Five Thousand Seven Hundred ($5,700.00) Dollars, as security, which was part of the Estate of the Bankrupt. The Petition finally disclosed the fact that JOHNINA, INC. was owed no moneys, and was withholding the funds in question without right to do so, and prayed for appropriate relief and the turn over of the funds in question. This Turn Over Order was directed to the security deposit of Five Thousand Seven Hundred ($5,700.00) Dollars held by JOHNINA, INC. pursuant to the Lease Agreement. (T-20) A Rule to Show Cause (T-4) was served upon JOHNINA, INC., and it first appeared and filed its Motion to Quash (T-5) which was, after Hearing, denied by the Referee. (T-13) JOHNINA, INC. next filed its Answer to the Trustee's Petition (T-16), and the Trustee filed a Motion to Strike said Answer and scheduled a Hearing on said Motion for October 13, 1959. (T-47) At this Hearing full, and complete, testimony

was taken including evidence presented by ROYAL FLAGG JONAS, President of JOHNINA, INC. After the presentation of all factual, and legal, questions, and argument thereon, the Referee entered the Turn Over Order dated October 16, 1959. (T-59-60)

In response to this determination the said JOHNINA, INC., through new Counsel, IRVING M. WOLFF, filed its Petition for entry of an Order extending time to file Review, (T-61) which was granted. During this period, of course, the Referee entered his Formal Order Directing Turn Over of the Property (T-45), and JOHNINA, INC., on October 29, 1959 (T-65), filed its Petition for Review.

On March 5, 1960 JOHNINA, INC. filed its Brief which was rebutted by the Trustee. After Hearing the District Judge entered his Order of Reversal (T-72) of the Referee's Turn Over Order. From this Order of March 28, 1960 Trustee filed her Appeal to the Circuit Court of Appeals, Fifth Circuit. On June 21, 1961 the Circuit Court of Appeals, Fifth Circuit, rendered its decision reversing the decision of the Federal District Judge as reported in 291 F. 2d 619.

ARGUMENT

Petitioner's argument for the granting of this Writ seems to indicate vagueness and inability to "pin point" any real decisive issue presented by the Decision of the Circuit Court of Appeals for the Fifth Circuit which should be reviewed by this court. The argument, encompassing some six (6) pages, attempts to convince this Court that the decision rendered by the Court of Appeals for the Fifth Circuit is alien to, and disturbs, our entire

system of jurisprudence. This is just not the case. The decision by the Court of Appeals for the Fifth Circuit initially discusses the procedural aspects of the cause, and the Court says at Page 620 of its opinion:

> "It is clear that the proof by the Appellee, Johnina, that it held the $5,700.00 in accordance with the terms of the lease agreement would not be sufficient to entitle it to retain the sum as liquidated damages, for a provision such as that here involved has been held by the Florida Courts to amount to a penalty rather than liquidated damages. **Stentor, Inc. v. Lester, 58 So. 2d 673, at 675 (Fla.).**"

This initial premise is correct. But, the Court continues in its Decision and establishes what the Petitioner, JOHNINA, INC., should have done in order to prevail as quoted from Page 621 of its opinion:

> "Thus, the burden was on the landlord to prove the amount of his actual damages, once it was clear that the Referee has acquired jurisdiction over the issue by failure of the Appellee, in its Motion to Quash, to assert any factual basis for its claim. The Appellee failed to do this. The record before us shows nothing more than a colloquy between the Referee, Counsel for the Trustee, Counsel for the Bankrupt, and Counsel for Johnina, Inc., (who was not Counsel on this Appeal), which was little more than a discussion of the legal points involved. No effort was made by the landlord to tender proof of damages."

The Court, in its discussion, has disclosed that the Petitioner herein failed and refused, at the Trial level, to properly establish its claim to the security fund. See **Nicholas v. Peter Pan Shops, C.C.A. 5th, 256 F. 2d 349.** Thus, the claim of the Petitioner can only be categorized as colorable, and, in such case, constructive possession of the fund would be in the Bankruptcy Court, and subject to Summary Jurisdiction. See **Collier on Bankruptcy, Sec. 23.03, p. 443 thru 449.** The learned Court of Appeals, in conclusion, delineated certain requirements that the Petitioner herein would have had to meet before the Referee in Bankruptcy in order to prevail, and the Court, finally, reversed and remanded this cause.

It is most evident that the action of the Court of Appeals was proper, and not in contradiction to an Federal Statute, or Rule of Civil Procedure, as enumerated by the Petitioner in its argument. There can be no doubt that the Court of Appeals decision is a most current expression of a line of decisions in this area. See **In Re: Independent Book Corporation, D.C., N.Y., 33 Fed. Supp. 275.**

The question of jurisdiction of the Bankruptcy Court to determine issues of this type is clear beyond doubt. **Vol. 2, Collier on Bankruptcy, Sec. 23.04, p. 454** states:

> ". . . . This jurisdiction (referring to summary) exists under Sec. 2(a)7 of the Act together with the inherent right in all courts to protect their possession, and is not effected by the provisions of Sec. 23. It includes the power to determine the validity of the lien of a mortgage, or a mechanics'

> lien on the property, or the right to possession of **leased** premises in the possession of the Bankrupt . . . " (Emphasis added and parenthesis added.)

On the question of the propriety of the Referee's decision as to the security deposit, one of the recent, well reasoned, decisions can be observed in: **In the Matter of: Muntz T.V., Inc., Debtor (Jay Milin, et al. v. C. Wylie Allen, et al.), C.C.A. 7th, 229 Fed. 2d 228.** This decision by the Seventh Circuit affirms the propriety of summary jurisdiction of a Master acting in Bankruptcy as adopted by the District Court in determining the final situs of a security deposit being claimed by a Trustee in Bankruptcy as well as the landlord.

The Court stated at Page 231 of its Opinion:

> " . . . The cases as pointed out by the Master firmly establish the principal that a Bankruptcy Court has summary jurisdiction over money, or property, in the hands of a third party, deposited **for the purpose of security** . . . "

This decision has been followed in the Case of **Reconstruction Finance Corp. v. Kaplan, C.C.A. 1st, 185 Fed. 2d 798.**

It is most apparent that the decision of the Court of Appeals herein rests on sound judicial authority and cannot be considered a new, or novel, question, nor does the decision impede, or contradict, any of the Statutes or General Orders in Bankruptcy. Finally, the decision is not in contradiction of any of the Federal Rules of Civil Procedure.

The assertions by the Petitioner that the opinion tends to amend the Civil Rules of Procedure, that it creates confusion, or a hiatus, as to Federal authority just cannot be substantiated by a review of the Record herein.

CONCLUSION

The Respondent herein respectfully prays that this Court deny the Petitioner's Writ of Certiorari. The decision of the Court of Appeals for the Fifth Circuit is proper, and should be allowed to stand undisturbed, unabridged, and unaltered by this Honorable Court.

FRANK & WESTON,
1335 Lincoln Road
Miami Beach, Florida
Attorneys for Respondent

By: Robert C[illegible]

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Reply Brief to Petition for Writ of Certiorari has been furnished to IRVING M. WOLFF, Attorney for Petitioner, Biscayne Building, Miami, Florida, this 1st day of February, A.D. 1962.

Robert C[illegible]